

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK KABAY JOMAH,

Defendant-Appellant.

UNPUBLISHED

June 6, 2013

No. 308578

Wayne Circuit Court

LC No. 11-008138-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion), or MCL 750.520d(1)(c) (defendant knew or had reason to know that the victim was mentally incapable at the time of the incident).¹ The trial court sentenced defendant to 6 to 15 years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to prove, beyond a reasonable doubt, that defendant knew or had reason to know that the victim was mentally incapable. We disagree.

Sufficiency-of-the-evidence questions are reviewed de novo, and we view the evidence in the light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). In addressing a sufficiency claim, this Court determines whether a rational trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 216-217; 792 NW2d 776 (2010). The prosecution may use circumstantial evidence and reasonable inferences to prove the elements of a crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

¹ The jurors were given both variables as options for finding guilt. The transcript reflects that the jurors found, specifically, that defendant was guilty “through force or coercion or [because] the victim was mentally incapable.”

MCL 750.520d(1)(c) provides:

A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

This Court has noted that a defendant is not guilty of third-degree criminal sexual conduct pursuant to MCL 750.520d(1)(c) “where the mental defect is not apparent to reasonable persons.” *People v Cox*, 268 Mich App 440, 446; 709 NW2d 152 (2005) (internal citation and quotation marks omitted).

There was significant evidence that defendant knew or had reason to know that the victim was mentally retarded. Defendant’s stepfather, Yarkpazuo Bah-Deh, as well as the victim’s legal guardian (and defendant’s step-uncle), Pewu Bah-Deh, informed defendant that the victim was intellectually challenged. There was testimony that defendant indicated that he understood this information. Defendant came over to Pewu’s house and met the victim on multiple occasions. On one of these visits, defendant inquired about the victim by asking if she was “acting up.” Pewu responded that sometimes she acted better than at other times. The victim also went over to defendant’s house on multiple occasions. According to the victim’s psychologist, Danielle Dobija, the victim had some trouble speaking and understanding verbal language. Dobija opined that if the victim was acting guarded, it might take some time to notice her mental retardation, but if she was openly interacting with a person her mental retardation would be apparent. Although some of the testimony suggested that the victim was tentative around defendant, defendant testified that he chatted with the victim on Facebook, talked to her on the telephone, and interacted with her before they had sex. The evidence as a whole was sufficient to show that defendant either knew or had reason to know about the victim’s mental incapacity.

Next, defendant argues that the credible evidence preponderates against the verdict and that the verdict must be vacated. We disagree.

“[T]his Court reviews a trial court’s decision on a motion regarding the great weight of the evidence for an abuse of discretion.” *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). “A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes.” *Id.*

“An appellate court will review a properly preserved great-weight issue by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). “[I]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial.” *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998) (internal citations and quotation marks omitted). There are a few exceptions to this general rule, including when the testimony “contradicts indisputable physical facts or laws,” “is patently incredible or defies physical realities,” “is material and is so inherently implausible that it could not be believed by a reasonable juror,” or has been “seriously impeached and the case marked by uncertainties and discrepancies.” *Id.* at 643-644 (internal citations and quotation marks omitted).

There was significant credible evidence that defendant knew or had reason to know that the victim was intellectually challenged. Yarkpazuo and Pewu informed defendant that the victim was intellectually challenged. Defendant indicated that he understood. Dobija stated that if the victim was openly interacting with a person, her degree of mental retardation would be readily apparent, and defendant testified that the victim openly interacted with him on multiple occasions. None of this testimony was patently incredible, defied physical realities, or was so inherently implausible that it could not be believed by a reasonable juror. Therefore, the verdict was not against the great weight of the evidence.

Finally, defendant argues that the prosecutor committed misconduct by misstating the law and that reversal is required. We disagree.

This Court reviews preserved issues of prosecutorial misconduct de novo to determine if the prosecutor's statements denied the defendant a fair and impartial trial. *Bennett*, 290 Mich App at 475. Generally, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as [they relate] to [the prosecutor's] theory of the case." *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010) (internal citations and quotation marks omitted). A prosecutor compromises a defendant's right to a fair trial when he or she interjects issues broader than the guilt or innocence of the accused. See *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). This Court must read a prosecutor's statements in context, evaluating the statements in light of the evidence presented at trial and the defendant's arguments. *Id.* at 64.

During the prosecutor's cross-examination of defendant's mother, Kebbeh Bah-Deh, the prosecutor asked Kebbeh if "the only issue [in the case] is whether or not this jury believes that [the victim] has mental issues; correct?"² This mischaracterization of an important issue in the case did not deny defendant a fair trial. The trial court cured any potential jury confusion by giving the jury several instructions that cured the error. Courts presume that jurors follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). The trial court instructed the jurors, "You must take the law as I give it to you. If a lawyer says something different about the law follow what I say." The trial court also instructed the jurors, in the initial and the final jury instructions, that the lawyer's questions were not evidence. The trial court instructed the jury that the prosecutor, to obtain a conviction, had to produce evidence to prove that defendant "knew or should have known that [the victim] was mentally incapable at the time of the alleged act."³ Finally, the trial court indicated that it was going to provide the jury a copy of the instructions that were read to them. The written jury instructions in the lower-court record include language that defendant must have known or had reason to know about the victim's mental incapacity.

² Defendant contends that the question led jurors to believe that only the victim's mental capacity was at issue and not defendant's knowledge or imputed knowledge about that capacity.

³ The Court later adequately indicated that there was an "either/or" option with regard to the "force" and "mental incapacity" variables under MCL 750.520d.

Defense counsel, on redirect examination, also asked Kebbeh to clarify if she meant that the pivotal issue was whether the victim was mentally retarded or whether defendant knew the victim was mentally retarded. Kebbeh indicated that it was the latter. Further, during the prosecutor's opening statement and closing argument, she emphasized that the major issue in the case was whether defendant knew or had reason to know that the victim was mentally incapable. This too eliminated any potential jury confusion. Reversal is unwarranted.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Patrick M. Meter